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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 216

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 69–97) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered December 2, 1935 (R. 97). Motions for a new trial and amendment of findings were denied June 1, 1936 (R. 98–100). The petition for a writ of certiorari was filed July 22, 1936 (R. 100). The jurisdiction of this Court is invoked under Section 1 of the Act of March 3, 1927, c. 302, 44 Stat. 1349, and

Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C., Title 28, Sec. 288).

QUESTIONS PRESENTED

1. Whether the permanent taking of an undivided one-half interest in the Shoshone Indian Reservation by the Government for the benefit of the Northern Arapahoe Indians occurred in 1927 upon the passage of the Jurisdictional Act of March 3, 1927, and the filing of this suit thereunder by the Shoshone Tribe.

2. Whether the Shoshones are entitled to interest upon the value of the interest in the reservation permanently taken for the benefit of the Arapahoes and upon the value of the alleged temporary use and occupancy of the reservation by the Arapahoes.

3. Whether the court below erred, as a matter of law, in its determination of the value of the alleged temporary use and occupancy of the reservation by the Arapahoes.

TREATIES AND STATUTES INVOLVED

Reference to the pertinent statutory and treaty provisions will be found in the cross-petition filed by the Government in this case as No. 328, which will, of course, be submitted simultaneously with the instant petition.

STATEMENT

A summary of the pertinent facts as found by the Court of Claims is made in the Government's

cross-petition, to which the Court is respectfully referred.

DISCUSSION

The Court of Claims held that the date of permanent taking of an undivided one-half interest in the Shoshone Reservation for the benefit of the Arapahoes occurred on August 13, 1891, when the Commissioner of Indian Affairs advised the Woodruff Commission by letter "that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones" (R. 75). The petitioner contends that, for various reasons, this letter or "holding" of August 13, 1891, was "of no legal efficacy so far as concerned a permanent taking of any interest in the Shoshone Treaty Reservation lands" (Br. 25). In its cross-petition for writ of certiorari (No. 328), to which the Court is respectfully referred, the Government agrees with this conclusion but upon different grounds, and it contends that the true date of taking was in 1878 when the Government, without the consent of the Shoshones, placed the Arapahoes upon the Shoshone Reservation and thereafter continually kept them there over the objection and protest of the Shoshones. The petitioner contends, however, that the date of taking occurred in 1927 when the Jurisdictional Act of March 3, 1927, was passed and this suit was filed thereunder by the Shoshones. While we are of the opinion that the court below was correct in holding that the Jurisdictional Act did not

effect a taking by the Government (R. 77–78) and that, as that court said, "Its intent and purpose * * * was only to provide a forum in which the claims of the plaintiff tribe against the United States could be heard and adjudicated",[1] we do not oppose the granting of a writ of certiorari upon this question to the end that the Court may have before it all phases of the question as to the correct date of taking if it should decide to review that question.

II

We submit that the court below was clearly correct in holding that the petitioner was not entitled to an award of interest either upon the value of the interest in the reservation which was permanently taken by the Government on behalf of the Arapahoes or upon the value of the alleged temporary use and occupancy of the reservation by the Arapahoes (R. 93–95).[2]

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[1] See also in support of the court's conclusion the cases of *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Klamath Indians* v. *United States*, 296 U. S. 244, 250, 251.

[2] The question of the allowance of interest upon the value of the alleged temporary use and occupancy by the Arapahoes of the Shoshone Reservation would, of course, be removed from the case if the Court should hold, as contended by the Government, that the taking was in 1878 instead of in 1891, as held by the court below, or in 1927, as urged by the petitioner herein.

Properly viewed, this is a suit based upon a violation by the United States of Article 2 of the Treaty of July 3, 1868, guaranteeing the Shoshone Tribe the exclusive use and occupancy of their reservation. In other words, it is in essence a suit for breach of contract. Section 177 of the Judicial Code (U. S. C., Title 28, Sec. 284) provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." Inasmuch as the treaty makes no provision for the payment of any interest upon damages for violation of its provisions, Section 177 applies unless there is something in the Jurisdictional Act of March 3, 1927, under which this suit was brought, taking the case out of the operation of the statute. That there is no provision in this statute which may be construed as permitting the allowance of interest is evident from the analysis of the statute and the pertinent decisions made by the court below. The cases relied upon by the petitioner are not in point for the reason that they involved either the exercise of the power of eminent domain or were suits for damages under statutes which specifically authorized the payment of *just* or *entire* compensation, which is not the situation presented by this case. The case of *Yankton Sioux*

Tribe of Indians v. *United States*, 272 U. S. 351, 65 C. Cls. 427, also involved a taking under the power of eminent domain because the taking was pursuant to specific Congressional authorization (272 U. S. 354). As there does not appear to be any substantial doubt as to the correctness of the holding of the court below upon the interest question, there would seem to be no necessity for the issuance of a writ of certiorari to review that question.

III

For the alleged temporary use and occupancy of the reservation by the Arapahoes during the period between 1878 and 1891, the date as of which the court below held that the permanent taking occurred, an allowance of $332,475, or $25,575 for each of the 13 years, was made. This was at the rate of $25 a year for each of the Arapahoes who was on the reservation during this period. The court found that this amount was "fair and reasonable in the circumstances" (R. 82). The petitioner contends that the amount awarded should have been at least $1,066,000, or $82,000 a year, which would have been at the rate of about $82 a year for each Indian[3] (Br. 26). The argument

[3] The question of the proper amount to be awarded for the alleged temporary use and occupancy of the reservation by the Arapahoes for the period between 1878 and 1891 is, of course, only of materiality in the event this Court should

of inadequacy arises apparently from the fact that the court awarded $2,050,597.50 as the value of the undivided one-half interest which it held was permanently taken as of 1891. But, obviously, this value, which was practically the fee value, could have no decisive bearing upon the amount properly awardable during each of the 13 preceding years for a mere temporary interference with the right to use and occupy the reservation.

The court below arrived at its determination of the fair and reasonable value of the temporary use and occupancy of the reservation by the Arapahoes by considering the benefits accruing to the Government and the Arapahoes and the damages sustained by the Shoshones because of such temporary use and occupancy, and after considering these elements it found the per capita value of the right temporarily to use and occupy the reservation on the basis of the average annual population of the Arapahoe Tribe on the reservation during the 13-year period. Obviously, such a determination in-

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hold that the permanent taking occurred, as decided below, in 1891.

Because of its position that the taking occurred in 1927, the petitioner also makes the incidental contention that it should be awarded an allowance for the temporary use and occupancy of the reservation not only for the period between 1878 and 1891 but also from 1891 to 1927. Discussion of this question in advance of determination by this Court of the correct date of permanent taking would, of course, be premature.

volved the resolving of questions of fact which, of course, this Court will not attempt to review. The issuance of a writ of certiorari with reference to this point would, consequently, seem not to be required.

Respectfully submitted.

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SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 69–97) has not yet been reported. The memorandum and order of the Court of Claims overruling the motions